

# The American Law of Slavery 1810-1860: Considerations of Humanity and Interest

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## BOOK REVIEW

THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST. *Mark V. Tushnet*. Princeton: Princeton University Press. 1981. Pp. 262. \$20.00 (cloth), \$9.50 (paper).

Americans are fascinated by the history of Black slavery.<sup>1</sup> Even if the reasons for our interest in slavery are unclear, American books on slavery and its legal aspects generally have been written so as to vindicate the author's political or social ideology. A brief review of some of the leading books reveals this tendency and also sets the stage for consideration of Mark Tushnet's *The American Law of Slavery*.<sup>2</sup>

The first major study of slavery in this century was Ulrich B. Phillips's *American Negro Slavery*.<sup>3</sup> Phillips was a southern apologist and racist. His book attempted to place slavery in the context of a benign agrarian order, the "plantation regime," and to demonstrate that it was the northern capitalists and their abolitionist allies who provoked the Civil War. A less obvious theme of the book was the suggestion that Blacks were tolerably well off under slavery.

Kenneth Stampp's *The Peculiar Institution*<sup>4</sup> represented a liberal, non-sectionalist reaction to Phillips. Stampp accepted Phillips's general perspective on slavery as primarily a labor system. Stampp argued, however, that slavery survived only by savagely crushing Black victims. Stampp used legal materials, including statutory slave law and court decisions, to support his argument.

Stampp's book, which still dominates scholarship on slavery, was challenged in 1959 by Stanley Elkins in *Slavery*.<sup>5</sup> Elkins attempted to refocus historical discussion from slavery as a labor system to slavery as an institution to be considered anthropologically. Elkins contrasted American slavery with the slave systems of Spanish and Portuguese America. The latter systems interposed a powerful centralized institution, the Roman Catholic Church, between the slaves and their masters for certain purposes.<sup>6</sup> Elkins also drew on studies of World War II con-

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<sup>1</sup> The annual production of new books on various aspects of slavery illustrates this fascination. The 1981 Christmas book edition of the New York Times Book Review Section describes, for example, several new books on Black American slavery, aspects which in each case earlier books have discussed. N.Y. Times, Dec. 6, 1981, § 7 (Book Review), at 14, 58, 62.

<sup>2</sup> M. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981).

<sup>3</sup> U. PHILLIPS, *AMERICAN NEGRO SLAVERY* (1918).

<sup>4</sup> K. STAMPP, *THE PECULIAR INSTITUTION* (1956).

<sup>5</sup> S. ELKINS, *SLAVERY* (1959).

<sup>6</sup> *Id.* at 76-79.

centration camp inmates in an attempt to explain why slave resistance was less strong than one might have expected it to be. He suggested that the massive disorientation experienced by Blacks abducted from Africa and Jews transported to Auschwitz made these two groups psychologically similar.

Eugene Genovese's *Roll, Jordan, Roll*<sup>7</sup> rejected Elkins's conclusions but accepted much of his general approach. *Roll, Jordan, Roll* is a social history of slavery constructed from the perspective of the slaves. Genovese, a neo-marxist, posited that slavery as an economic institution was an anachronistic, precapitalist phenomenon. It sustained itself in the face of Black opposition by two devices. First, the law of slavery served a hegemonic function: It served to establish and legitimize for all classes and races a system that ultimately vested all power in a single class of wealthy southern merchants and landowners. Second, the dissemination of Christianity among the slaves proved, to use Marx's phrase, an opiate. Christianity taught the slaves not to resist; it soothed their frustrations with promises of freedom at the end of the line. A good deal of literary and religious evidence from the slave culture reflects this dual function of slave religion.<sup>8</sup>

Robert Cover's *Justice Accused*<sup>9</sup> was the first major book in this area to use legal materials almost exclusively. Cover studied the behavior of anti-slavery judges in cases involving slaves during the years 1800-1860 and found a decisional law retreat into formalism and rigid positivism. He attributed this retreat to the increasing level of dissonance in the judges, caused by the conflict between institutional demands and their personal opposition to slavery. Cover focused on four major judges, including Justice Joseph Story and Judge Lemuel Shaw. While Cover's book is more about judicial behavior than about slavery jurisprudence, it is appropriate to commence consideration with Mark Tushnet's *The American Law of Slavery, 1810-1860*.

Tushnet studied legal materials relating to the development of what he calls "American slave law" in the slave-holding states sixty years before the Civil War. He did not limit the study to legal materials out of a belief that the legal system operated independently of the society. Like most commentators who find marxist insights useful, Tushnet believes that any legal system, while perhaps having enough autonomy to guarantee its successful functioning in a hegemonic way, in fact reflects the material social relations of the underlying social order. Marxists vary, of course, as to the extent of autonomy given the basic ideology; all that one can say is that Tushnet does not seem to ally himself with those, like Genovese, who make great concessions to autonomy.

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<sup>7</sup> E. GENOVESE, *ROLL, JORDAN, ROLL* (1974).

<sup>8</sup> *Id.* at 161-93.

<sup>9</sup> R. COVER, *JUSTICE ACCUSED* (1970).

Tushnet's book is not a chronological survey of the development of slave law. In fact, he eschews the conventional historical approach of tracing slave law from colonial times until its destruction by the Emancipation Proclamation and the thirteenth amendment in either a single state or on a general level. The only exception to Tushnet's achronological approach is his description of the development of the common law of slavery in North Carolina from 1800 to 1860.

Understanding the chronology of the development of slave law is a precondition to understanding and evaluating Tushnet's book. Slavery did not exist at English common law.<sup>10</sup> Thus, when settlers came to the various colonies, they had no formal legal equipment to deal with slavery. At the same time, for reasons Winthrop Jordan has developed,<sup>11</sup> they accepted more or less the notion of having slaves, as opposed to servants, of African ancestry. As early as the seventeenth century, some colonies passed elaborate laws to regulate slaves and masters.<sup>12</sup> Other colonies did not pass colonial codes.<sup>13</sup> The northern colonies, which are not discussed in Tushnet's book, apparently allowed slaves and masters to pass through without explicit legal recognition or treatment until about the time of the revolution, when virtually all of the northern states abolished slavery by case law or statute.

After the passage of the Virginia Code in 1705,<sup>14</sup> the southern colonies enacted laws that defined in increasing detail the legal regime governing slavery. Slaves were denominated "chattel" property. Laws denied slaves the right to hold property. In some cases, slaves were subject to the criminal jurisdiction of special slaveholders' "courts." Some of these laws accorded minimal protections to slaves; for instance, the murder of a slave was recognized as a homicide. Many laws also regulated the property and other rights of free Blacks.

In *The Peculiar Institution*, Kenneth Stampp devoted a chapter to slave cases, codes, and the interpretation of codes.<sup>15</sup> Stampp suggested that the codes were increasingly "humanized" in the course of the nineteenth century. He did not develop this argument, however, or marshal evidence to support it. At other points, Stampp suggested that many legal rules became harsher, at least on their face, as time passed.

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<sup>10</sup> This claim requires qualification. It is true that the common law recognized villeinage, or the subjugated status of certain agricultural workers tied to land within the feudal structure. See 1 F. POLLOCK & W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 412-32 (2d ed. 1968). But villeinage was a status that flowed from one's tenure on a parcel of land, not from one's race, and that provided a community framework in the manorial courts for the protection of villeins' rights. These two characteristics distinguish villeinage from the racial slavery that developed in various English Colonies from the beginning of the imperial period.

<sup>11</sup> W. JORDAN, *THE WHITE MAN'S BURDEN* (1974).

<sup>12</sup> K. STAMPP, *supra* note 4, at 237-38.

<sup>13</sup> M. TUSHNET, *supra* note 2, at 90-91.

<sup>14</sup> See III W. HENNING, *THE STATUTES AT LARGE OF VIRGINIA* 447 (c. 49) (1812).

<sup>15</sup> K. STAMPP, *supra* note 4, at 237-79.

Taking a very different approach, Mark Tushnet argues that the American law of slavery, in its developing and in its most developed state, should be viewed from the perspective of bourgeois law. To use scientific terminology, bourgeois law is the "control" in his experiment. Bourgeois law, at its simplest, is the law governing the relationship between a capitalist employer and his workers. According to Tushnet, it is also the entire common law and its methodology. Bourgeois law is concerned initially with obtaining the labor of the worker; more fundamentally, it creates and preserves a bourgeois social order.

Tushnet's principal argument is that slave law could never be as circumscribed as bourgeois law. Because the relationship of master to slave was all-embracing, slave law could not be fitted into the common law, read "bourgeois law." Tushnet constructs a schema that graphically demonstrates his thesis:<sup>16</sup>

| <i>Bourgeois Law</i> | <i>Slave Law</i>                  |
|----------------------|-----------------------------------|
| Interest Alone       | Humanity (sentiment) and Interest |
| Partial              | Total                             |
| Common Law           | Statutory Law                     |
| Market Relations     | Slave Relations                   |
| Contract             | Tort                              |
| Analogies            | Categories                        |

This schema should not be viewed as a road map which explains in a simple fashion how slavery law reached a particular point of development. It is partially descriptive of intrinsic conditions:

|                  |                                   |
|------------------|-----------------------------------|
| Interest Alone   | Humanity (sentiment) and Interest |
| Partial          | Total                             |
| Market Relations | Slave Relations                   |

It is also partially descriptive of the structures and consequences for development that flowed from these conditions:

|            |               |
|------------|---------------|
| Common Law | Statutory Law |
| Contract   | Tort          |
| Analogies  | Categories    |

Finally, like all marxist dialecticism, the intrinsic condition becomes the final result:

|                |                                   |
|----------------|-----------------------------------|
| Interest Alone | Humanity (sentiment) and Interest |
|----------------|-----------------------------------|

Tushnet argues that since bourgeois law focused exclusively on interest and market relations, it could not be applied to the slave system. Therefore, an elaborate system of statutory law was developed to recognize and regularize the slave system. Tushnet believes that the law of slavery would have swallowed up the entire southern legal system, had it

<sup>16</sup> M. TUSHNET, *supra* note 2, at 216-18.

not been destroyed in the Civil War. He sets out his theory on this matter in the book's conclusion:

The manumission cases suggest that Southern law was moving in the same direction as Southern politics, and it may be useful to sketch, in conclusion, what a rationalized law of slavery might have looked like. The primary alteration would have been a transformation in the notion of property. It would no longer be defined as the expression of individual will, subject to regulation only for the most pressing social goals. Instead, property, at first only in slaves but eventually in everything, would be defined as the delegation by society as a whole of certain limited authority to "owners," who would be charged with exercising that authority only in socially prescribed ways. Once the master-slave relation was thus generalized, other anomalies would disappear. In particular, once social control was embodied in all relationships rather than being superimposed on them, there would be no need to distinguish between some relationships governed by market or individualistic notions and others governed by other notions; the strain toward categorization and its cognate problem, the attempt to define rigid racial rules, would be eased.<sup>17</sup>

Tushnet's thesis is extraordinarily interesting. As a way of beginning to evaluate it, let me assume the position of a common law irredentist, like Lord Mansfield. Mansfield is thought to have said in *Somerset's Case*<sup>18</sup> that because slavery was contrary to natural law, it could only exist by positive prescription in any legal system. Has Tushnet done anything more than show that Mansfield was correct two hundred years earlier? A common law lawyer's view of all the evidence Tushnet musters might be something like the following. The common law by 1775 could not adapt to two contrary signals on fundamental matters: slaves are property, and yet they are humans. According to Blackstone, property meant unfettered dominion and control. Yet slaves, supposedly chattel property, could not be so treated by the law because of their humanness. Viewed from the perspective of a common law irredentist, the slave case law confusion in states like North Carolina is easily explainable. Thus, Tushnet's data on the development of slave law can plausibly be fitted into both Tushnet's theory and Lord Mansfield's simple observation.

There are other interesting perspectives on Tushnet's schema. He assumes that there is a bourgeois law that remains stable and coherent throughout the period of his research. I do not think the common law was bourgeois in 1810;<sup>19</sup> others seem to agree with me.<sup>20</sup> The common

<sup>17</sup> *Id.* at 230-31. Ironically, this sounds like a description of feudal law.

<sup>18</sup> *Somerset v. Stewart*, 20 Howell St. Tr. 1 (K.B. 1772).

<sup>19</sup> Duncan Kennedy has argued that Blackstone's Commentaries were bourgeois in their conception of categories of the law. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

<sup>20</sup> See, e.g., M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

law may have been, as Horwitz argues, on its way to becoming bourgeois, but its bourgeoisness cannot be posited as a fact at the beginning of the period Tushnet covers.

I also question the placement of tort law in the slave law column of Tushnet's schema. He appears to have done this because of his interpretation of cases involving Black slaves in which Southern judges refused to apply the fellow servant rule. Under the fellow servant rule, the negligence of an injuring employee may not be imputed to his employer in an action by an injured employee against the employer for the work-related injury. One modern commentator has argued that the basis for the fellow servant rule was that such an imputation would discourage employees from exercising the necessary precautions to protect themselves from the negligence of a fellow servant.<sup>21</sup> This theory assumed that an employee would know in advance of the negligence of his fellow servant and would inform his supervisor or quit if necessary. Such a theory was obviously inapplicable in the case of a slave. In addition, a slave could not protect himself contractually. Therefore, in an action by a slave's master who hired out his slave who was then injured, the hirer could be held liable for the negligence of his own slave. At some level, the theory of these hired slave cases was that there was a failure of supervision.

Non-slave fellow servant cases held that the only protection an employee could secure against the negligence of a fellow employee was a contractual indemnity clause. A slave master, by contrast, could use the law of tort to recover in similar circumstances. Thus, Tushnet sets contract against tort in his schema. The problems with this simple contrast are manifold. Virtually all commentators believe that the law of tort was as influenced by the entrepreneurial milieu of early nineteenth century America as was contract law. In addition, tort law in 1800 was a nascent set of unconnected theories awaiting time and social development before they could become a unified whole. Finally, it is not clear to this day whether the fellow servant cases are properly viewed as contract cases, tort cases, or a combination of both.<sup>22</sup>

The problems with Tushnet's schema are less significant than the criticism to which I alluded earlier. Tushnet's method is obviously

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<sup>21</sup> See A. MANCHESTER, *A MODERN LEGAL HISTORY OF ENGLAND AND WALES 1750-1950*, at 287-93 (1980).

<sup>22</sup> Even if the fellow servant cases do not permit simple contrast of contract to tort, the fellow servant cases involving slaves that Tushnet discusses are very interesting. They reveal that in the context of a master suing to recover for damage to what he conceived to be his property, the intellectually absurd underpinnings of the fellow servant rule would not be extended beyond the employer-employee context. They also show, perhaps not accidentally, that slave masters would receive better protection than simple laborers.

achronological and alocal. Anyone acquainted with scholarship on American slavery is aware that major economic and geographic changes occurred in the institution of slavery during the period Tushnet discusses. New areas of the South were settled. The soil in some of the older states was exhausted. The end of the slave trade altered the market and sources for such labor. In another new book,<sup>23</sup> Paul Finkelman has argued that the northern courts became increasingly receptive to claims of freedom, asserted by Black slaves who sojourned, even momentarily, in a northern state.<sup>24</sup> Tushnet never mentions these changes. Surely their impact on slave law should be investigated. Because Tushnet homogenizes decisions of one decade and state with those of other times and places, one gets no sense of what these developments in the institution might have meant to the law of slavery.

Tushnet makes one controlled chronological excursus. He investigates North Carolina case law on criminal matters involving slaves, including the famous case of *State v. Mann*.<sup>25</sup> In *Mann*, the North Carolina Supreme Court held that a hiring master was not answerable for the crime of assault and battery prosecuted out by an injured, borrowed slave. Tushnet's exegesis of North Carolina case law purports to show how, in the absence of a comprehensive code, the North Carolina courts unsuccessfully attempted to develop the conceptual (and categorical) approach of slave law.

To evaluate Tushnet's thesis on North Carolina, consider the case of *State v. Tackett*.<sup>26</sup> The case involved the state's successful prosecution of one Tackett, a white apprentice, for killing Daniel, a Black slave. Daniel was lying in wait for Tackett at Tackett's home as a result of prior quarrels between them. Tackett came home, got a gun, and killed Daniel.

At the trial, Tackett's lawyer attempted to introduce evidence that Daniel was "turbulent," "impudent," and "insolent." His intent was to show that Daniel's chronic insolence, read "uppitiness," made the killing manslaughter at worst, and perhaps no more than a justifiable homicide. The trial judge excluded the evidence because it was not related either to Daniel's general behavior toward Tackett, or to Daniel's behavior on the night of the killing.

At the time of the trial and appeal, North Carolina had three statutes that arguably governed the case.<sup>27</sup> This fact, although admitted by

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<sup>23</sup> P. FINKELMAN, *AN IMPERFECT UNION* (1981).

<sup>24</sup> *Id.* at 126-80.

<sup>25</sup> 13 N.C. (2 Dev.) 263 (1824).

<sup>26</sup> 8 N.C. (1 Hawks) 210 (1820).

<sup>27</sup> Chapter 4 of the North Carolina Laws of 1791 provided:

And whereas by another act of Assembly passed in the year 1774, the killing of a slave, however wanton, cruel and deliberate, is only punishable in the first instance by imprisonment and paying the value thereof to the owner;



Tushnet, struck me as odd because North Carolina was supposedly a state without an extensive series of statutes governing slavery. I will leave it to others to determine whether North Carolina's system of haphazard slave statutes was really very different from the states with slave codes. The purport of the three statutes is fairly clear. A statute of 1791 repealed a statute of 1774 insofar as it made a premeditated, willful murder of a slave not common law murder. Thus after 1791, the killer of a slave could be tried for common law murder. An 1801 statute attempted to prohibit procedural evasions used to defeat the commencement of a prosecution of a slave murderer. An 1817 statute seems to have been an attempt to decree that the killing of a slave, short of common law murder, would still constitute a criminal offense, *e.g.*, manslaughter. Without the 1817 statute, the statute of 1774 arguably rendered a non-murder, homicide of a slave not a criminal offense.

On appeal, the Attorney General in *State v. Tackett* argued that the statute of 1817, which referred to killings of slaves under "like circumstances," was inapplicable to the case because Tackett was a murderer. Because there was no "justification" for murder, as opposed to manslaughter, the evidence brought up at trial, which was designed to show how the circumstances were "unlike," was properly excluded.

Tackett's attorney argued on appeal that the law of 1817 did nothing more than make the manslaughter of a slave a criminal offense. The law did not purport to limit or control the evidence which might be introduced in a proceeding to determine whether the killing was justifiable:

But it does not pretend to define what shall constitute the slaying of a slave manslaughter: it leaves that to be determined by the Judges,

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which distinction of criminality between the murder of a white person and of one who is equally an human creature, but merely of a different complexion, is disgraceful to humanity and degrading in the highest degree to the laws and principles of a free, christian and enlightened country: *Be it enacted . . .* That if any person shall hereafter be guilty of willfully and maliciously killing a slave, such offender shall upon the first conviction thereof be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a free man; any law, usage or custom to the contrary notwithstanding. *Provided always*, That this act shall not extend to any person killing a slave outlawed by virtue of any act of Assembly of this state, or to any slave in the act of resistance to his lawful owner or master, or to any slave dying under moderate correction.

*reprinted in* II NEWBERN, MARTIN & OGDEN, THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 8-9 (1804).

Chapter 21 of the Acts of 1801 provided: "That if any person shall hereafter be guilty of feloniously, wilfully and maliciously killing any slave, such offender, upon conviction thereof, on being arraigned stands mute, or challenge peremptorily more than thirty-five jurors, shall suffer death without benefit of clergy."

Chapter 18 of the laws of 1817 provided "[t]hat the offense of Killing a Slave shall hereafter be denominated and considered homicide, and shall partake of the same degree of guilt when accompanied with the like circumstances that homicide now does at common law." An Act to punish the offense of killing a slave, Ch. 18, 1817 N.C. Laws 18.

under the ordinary rules of law: and while the Common Law lays down general rules, by which we are to ascertain whether the killing of one man by another, between whom there is no relation, and who stands on an equality with each other, be murder or manslaughter, or neither, and lays down different rules to govern cases in which the deceased stand in particular relations of dependence and inferiority to the slayer, as an apprentice, servant, pupil, sailor or soldier, to his master, tutor, or officer. So here, where the wide distinction exists in the grades of our society between freemen and slaves-whites and blacks; and where the policy of the Law as well as the inveterate habits of our population, and the best feelings of our nature enjoin it upon us to keep these classes as distinct in every respect as possible, and, to that end, to enforce the superiority of the one, and the subordination due from the other, a new rule must be laid down fitted to this state of things, and adapted to this particular relation and the exigency of our situation. A free man, who hath been taught from his infancy to look for humility and obedience in a slave, and who feels every moment of his life the vast superiority that he has over him, early learns that tamely to submit to words of reproach from a slave is degrading to the last degree, and that a blow, even the slightest, is the greatest dishonor. At such an insult, therefore, his passions are inflamed to the utmost pitch; and if, in such a state, he slay the offender, he has a right to claim the benefit of that rule which regards mercifully the frailty and infirmity of human nature. If any precise rule could be laid down, I would say that a *word* from a slave was a provocation equal to a blow from a free man; and the most trifling assault, to a deadly stroke. There is, in the very nature of things, an essential difference between the cases of slaves and free men; and the Court cannot disregard it, arising as it does, out of our population, laws, education, and habits.<sup>28</sup>

It is implicit in this argument that: (1) the evidence, if probative, was admissible to refute a charge of murder; (2) generalized evidence of Daniel's "insolence" would give rise to a presumption that he was insolent to Tackett; and (3) the jury should have been permitted to consider this evidence before convicting Tackett.

The Supreme Court of North Carolina, in an opinion by Chief Justice Taylor, agreed that the evidence was improperly excluded. The lower court erred when it directed the jury "that under the act of 1817, the case was to be determined by the same principles of law as if the deceased had been a white man." Instead, the Supreme Court held that the Act merely made the manslaughter of a slave a criminal offense and left it to the courts to decide what evidence was admissible on the question of whether the homicide was justifiable. The court also specifically held that in the context of a slave society, insolent words might consti-

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<sup>28</sup> 8 N.C. (1 Hawks) at 214-15.

tute a defense for a murder although mere words could not excuse a murder at common law. Consequently, the court ordered a new trial.

Tushnet believes that the *Tackett* decision, as part of North Carolina decisional law, illustrates that the analogical method of the common law could not develop the more stable categorization approach of the codes. But the more I think about *Tackett*, the more I am convinced that it supports a very different interpretation of the North Carolina cases and the codes. At a simple level, the decision suggests that common law judges will deal with statutory interventions as a common law matter. In all probability, the phrase "like circumstances" in the 1817 act meant that all common law defenses against a charge of manslaughter, including a justificatory argument, were available in an action involving slaves. It did not mean, until Chief Justice Taylor glossed it in *Tackett*, that like circumstances included the peculiar circumstance attendant in the social phenomenon of enslavement.

To present my position more generally, why is it that a code, when left to judicial interpretation as was done in parts of the South, could deal more stably with the slavery system than the common law—assuming the common law could possibly deal with the system. Tushnet assumes, I believe, that statutes could create categories that the common law "analogy" method could not develop. Tushnet also posits that, because slavery was viewed as a form of property ownership subject to state regulation, the codes established a more compelling model of legal regulation than did the common law. But what is so stable about the statutory "categories"? Clients, lawyers, and judges frequently expand, negate, and otherwise change statutory categories by using arguments that are analogical. Sophisticated statutory interpretation is at best a form of common law rulemaking. Tushnet's dichotomization of slave law/categories/statutory law, and bourgeois law/analogies/common law, denies this.

If I am correct that Tushnet's dichotomy is wrong, then two conclusions follow. First, his prediction as to where slave law could have gone<sup>29</sup> is supportable only at the level of grand ideology. The southern states adopted slave codes, not because the common law system was intrinsically unable to accept slavery, but because it could not sort out the different rules that the slaveholders thought desirable with sufficient rapidity to satisfy them. Its slowness to adjust and to afford adequate control is attributable to the common law method and to the problems of reconciling what were fundamental and inconsistent notions: that slaves were property, yet they were also humans. Second, the dichotomy itself collapses if the legal, institutional basis that Tushnet argues determined the sorting out of slave law does not exist. That slave law was an aspect

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<sup>29</sup> See text accompanying note 17 *supra*.

of American law shows, more than anything else, how law can be called upon to serve almost any societal end.

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